84-1239

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET YOUNG,

Petitioner,

v.

JOHN LEHMAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1.* Did the court of appeals exceed its authority under Rule 52, F.R.C.P., by reversing a factual finding of intentional discrimination merely because it "disagreed" with the district court and without even purporting to find "clear error"?

2.* Does Rule 52(a), F.R.C.P., forbid the courts of appeals from reviewing the credibility findings of a trial judge?

3.** Did the court of appeals correctly hold that Title VII permits an employer to discriminate on the basis of race among equally qualified applicants?

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*A similar question is already pending before this Court in Anderson v. City of Bessemer City, No. 83-1623, and Miller v. Mercy Hospital, No. 83-1629.

**A similar question is already pending before this Court in Anderson v. City of Bessemer City, No. 83-1623, Brief for Petitioner, p. 47-49. The court of appeals in the instant case expressly relied on its earlier decision in Anderson (18a).

PARTIES

The parties to this proceeding are Margaret Young and John Lehman, Secretary, Department of the Navy.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statute and Rule Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	15

APPENDIX

Opinion of the Court of Appeals, November 5, 1984	1a
District Court Findings of Fact and Conclusions of Law, May 20, 1983	20a

TABLE OF AUTHORITIES

Cases — Page

Anderson v. City of Bessemer City, No.83-1623 . . . . . i, 7, 8, 14

Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983) 12, 13

Brown v. Parker-Hannifin Corp., 436 F.2d 1407 (10th Cir. 1984) 14

Casillas v.United States, 335 F.2d 78 (9th Cir. 1984) 14

Colon-Sanchez v. Marsh, 733 F.2d 78 (10th Cir. 1984) 14

EEOC v. Federal Reserve Board, 698 F.2d 633 (4th Cir. 1983) . . . 12

Mason v. Continental Illinois National Bank, 704 F.2d 361 (7th Cir. 1983) 14

Miller v. Mercy Hospital, No. 83-1629 . . . . . 1, 7, 10

Pullman Standard Co. v. Swint, 456 U.S. 273 (1981) 3, 8, 9

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980) 6, 13

Wainwright v. Witt, 53 U.S.L.W. 4108 (1985) 11, 12

Other Authorities — Page

23 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-2(a) 2

Title VII, Civil Rights Act of 1964 . . . . . i, 11, 12, 13, 14

Rule 52, Federal Rules of Civil Procedure . . . . i, 3, 8, 9

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MARGARET YOUNG,

Petitioner,

v.

JOHN LEHMAN

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner Margaret Young respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the fourth circuit entered in this proceeding on November 5, 1984.

OPINIONS BELOW

The decision of the court of appeals is reported at 748 F.2d 194, and is set out at pp. 1a-19a of the Appendix. The

district court's Findings of Fact and Conclusions of Law, which are not reported, are set out at pp. 20a-33a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

It shall be an unlawful employment practice for an employer -

> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon.... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses....

STATEMENT OF THE CASE

This case presents precisely the sort of narrow issue of historical fact which Rule 52 and Pullman Standard Co. v. Swint, 456 U.S. 273 (1981), contemplate will ordinarily be resolved by a district court.

In November, 1976, Navy Department officials announced the existence of the vacant supervisory position which is the subject of this dispute. On the same day as this announcement, and without any pretense of considering other possible

applicants, the position was given on a "temporary" basis to Christopher Iekel, a white department employee. Iekel remained in this temporary position, in admitted violation of Civil Service regulations, for approximately 4 months. Iekel and several others applied for a permanent promotion to the position. Among the applicants was petitioner, a black Navy Department employee with several years more experience than Iekel.

A selection panel was duly convened to consider these applications, and in January, 1977, the panel recommended that petitioner be given the promotion. Applicant Iekel was rated no better than third. Rather than appointing petitioner to the position, Navy Department officials took the apparently unprecedented step of rejecting all of the recommended ratings, and disbanding the original panel. A second panel was then constituted to review the same applications. This second

panel issued ratings completely different than its predecessor, ranking Iekel first, and lowering petitioner's ranking to sixth out of eight applicants. The same officials who had rejected the recommendations of the first panel promptly accepted the recommendations of the second panel, and awarded the position to Iekel.

Petitioner commenced this Title VII action in the United States district court, alleging that she was denied the disputed promotion because of her race. The central question at trial was why the defendant officials had chosen to hire Iekel rather than petitioner. The Navy urged that the original panel ratings were defective, and that Iekel was ultimately selected because he was better qualified than petitioner. The district judge rejected this explanation as "unworthy of concluded". (32a). The district court found that the recommendation of the

original panel had been rejected because Navy officials had decided in advance to give the position to Iekel. (28a) The trial court characterized the official explanation for the rejection of that first recommendation as "a poorly disguised effort to cover the selecting official's desires to have Mr. Iekel appointed to the position...." (29a)

The fourth circuit reversed. The appellate court did not find any mistake of law in the district court opinion, instead commending the trial judge for correctly applying the standards announced in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980). (9a) Nor did the appellate court hold that the trial judge's factual findings were clear error. Rather, the appellate panel, having conducted its own review of the record, stated simply that it "disagreed" with the trial court's finding of discrimination. (10a, 14a).

REASONS FOR GRANTING THE WRIT

This case presents the most recent example of the practice of appellate factfinding which inexplicably remains the norm in the fourth circuit and which is described in detail in the certiorari petitions in Anderson v. City of Bessemer City, No. 83-1623, and Miller v. Mercy Hospital, No. 83-1629. Here, as in Anderson, Miller and at least 10 other cases in the last three years, the fourth circuit reversed a trial court finding of intentional discrimination.[1] Here, as in Miller, the fourth circuit expressly overturned a trial judge's determination as to whether defense testimony was worthy of credence. Here, as in Anderson the fourth circuit based its reversal in part on the doctrine, adhered to in that circuit only, that the plaintiff in a Title VII case must prove that he or she

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[1] Petition for Writ of Certiorari, Anderson v. City of Bessemer City, pp. 14-17.

is better qualified than the successful applicant. The panel in this case expressly cited and relied on the fourth circuit's earlier decision in Anderson itself. [2] (18a)

In Anderson the fourth circuit gave at least lip service to the limited standard of review which restricts appellate reconsideration of district court factfinding. Here there was no such pretense. The panel in the instant case did not purport to comply either with the strictures of Rule 52 or with the commands of Pullman Standard Co. v. Swint, 456 U.S. 273 (1982). The court of appeals opinion in the instant case

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[2] In this case, as in Anderson, the panel concluded that the plaintiff was rejected for a "reason" never actually articulated by any defense witness at trial. The Fourth Circuit here suggested petitioner was less qualified because she was guilty of "nearly 30% absenteeism in 1976." (17a). Petitioner had sustained a work related injury in 1976, and the defendant never suggested at trial the resulting medical leave was or could reasonably have been among the justifications for denying her the promotion.

contains not a single reference to Swint or Rule 52, and does not assert that the district court's factual findings are clearly erroneous. The phrase "clear error" appears nowhere in the opinion below. The fourth circuit reversed the factual findings in this case solely because it "disagree[d]" with the trial judge. (10a, 14a) The decision of the court of appeals here is not merely inconsistent with Rule 52 and Swint; it starkly illustrates the sort of appellate factfinding which has become an accepted practice in the fourth circuit.

The resolution of this case necessarily turned largely on the demeanor and credibility of the Navy officials who took the stand to explain why they had rejected the original panel recommendation that petitioner be promoted. The district judge found their explanations "unworthy of credence". (32a) The court of appeals "disagree[d]" with that assessment,

insisting "[w]e perceive no sufficient reason to substitute our judgment for that of the Navy...." (14a) The district judge, having heard the testimony of the official responsible for convening a second panel, concluded that his story "was a poorly disguised effort to cover the selecting official's desires to have Mr. Iekel appointed". (29a) The court of appeals, having reviewed the cold record, concluded there was "a valid reason" for replacing the original panel. (15a) The appeals panel's action was consistent with the plenary de novo review of credibility determinations that are now commonplace in the fourth circuit.[3] The extent to which such determinations are subject to appellate review is an important issue about which the courts of appeals are

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[3] See Petition for Writ of Certiorari, Miller v. Mercy Hospital, pp. 9-10.

widely divided,[4] and which is among the issues now pending before this Court in Anderson v. City of Bessemer City.[5]

This Court recently emphasized the role of trial court credibility determinations in Wainwright v. Witt, 53 U.S.L.W. 4108 (1985). In the instant case the court of appeals believed that the cold transcript contained "no clear-cut indication that race played a part" in respondent's actions. (13a). Witt rejected a similar argument that a transcript must demonstrate with "unmistakable clarity" the correctness of a trial court's decision. "Despite [any] lack of clarity in the printed record, . . . there will be situations where the trial judge is left with the definite impression" that the circumstances are as claimed by a party. 53 U.S.L.W. at 4112.

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[4] Id.1, pp. 10-35.

[5] See Brief for Petitioners, pp. 58-75.

Although some Title VII cases present complex legal questions, the issue here was largely one of whether the trial judge believed the explanation given by of the officials who chose Iekel over petitioner. Clearly he did not. "Face to face with living witnesses the original trier of facts holds a position of advantage from which appellate judges are excluded . . . . How can we say the judge is wrong? We never saw the witnesses." 53 U.S.L.W. at 4114.

In reversing the district court's finding of intentional discrimination, the court of appeals expressly relied on the fourth circuit rule[6] that a plaintiff in a Title VII disparate treatment case must prove that he or she is "better qualified" than the successful applicant. (18a) In the fourth circuit a Title VII

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[6] That rule was earlier applied in Anderson v. City of Bessemer City, 717 F.2d 149, 153 (4th Cir. 1983) and EEOC v. Federal Reserve Board, 698 F.2d 633, 672 (4th Cir. 1983).

action in a case in which several candidates were equally qualified is as a matter of law doomed to failure. Since the plaintiff in such a case cannot prove that he or she is better qualified, the courts must in every instance rule for the defendant, regardless of the presence of discriminatory motivation. As candidly explained by the fourth circuit in Anderson, "among equally qualified candidates, an employer has discretion to choose the person he prefers", 717 F.2d at 154, regardless of whether the reason for that preference may be race.

The fourth circuit rule applied here and in Anderson was expressly rejected by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Burdine held that an employer is not free to discriminate on an otherwise impermissible basis among equally qualified individuals. "[T]he employer has discretion to choose among equally

qualified candidates, provided the decision is not based upon unlawful criteria". 450 U.S. at 259 (Emphasis added). A requirement that a Title VII plaintiff prove that he or she was better qualified than the successful applicant for a position would effectively repeal Title VII for the substantial number of positions in the United States labor market for which all of the qualified applicants are essentially equally qualified. The fourth circuit rule is in clear conflict with the prevailing construction of Title VII in other circuits.[7]

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[7] Brown v. Parker-Hannifin Corp., 436 F.2d 1407, 1410 n. 4 (10th Cir. 1984) (plaintiff need only be equally qualified as the successful applicant); Casillas v. United States Navy, 335 F.2d 338, 344 (9th Cir. 1984) (choice among equally qualified candidates may not be based on race); Colon-Sanchez v. Marsh, 733 F.2d 78, 82 (10th Cir. 1984) (choice among equally qualified candidates may not be based on race); Mason v. Continental Illinois National Bank, 704 F.2d 361, 366 (7th Cir. 1983) (choice among equally qualified candidates may not be based on race).

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit. In the alternative, the Court may wish to defer action on this petition until the decision in Anderson v. City of Bessemer City.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 83-1903

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Margaret Young,

Appellee,

versus

John Lehman, Secretary,
Department of the Navy,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria. Richard L. Williams, District Judge. (C/A 82-1089).

Argued: August 27, 1984
Decided: November 5, 1984

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and BUTZNER, Senior Circuit Judge.

George E. Lawrence, Jr., Special Assistant United States Attorney (Elsie L. Munsell, United States Attorney; Pamela A. Smith, Assistant Counsel, Dept. of the Navy on

brief) for Appellant; Joan M. Wilbon (Wilbon, Killingham & Green; Robert Alexander on brief) for Appellee.

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SPROUSE, Circuit Judge:

John Lehman, as Secretary of the Department of the United States Navy, appeals from the decision of the district court which held that Margaret Young was denied a promotion in one of the Navy commands on the basis of racial discrimination. The district court concluded that Young presented a prima facie case of discrimination and that the Navy's proffered non-discriminatory reasons were pretextual in that they were "unworthy of credence." We reverse.

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I

The Navy Ship Engineering Center (NAVSEC) issued vacancy announcements on November 1, 1976, and November 11, 1976, each advertising the position of Supervisory Personnel Management Specialist. The ultimate duty stations were to be Arlington, Virginia.

Margaret Young, a black female, submitted an application for the Supervisory Personnel Management Specialist position along with six other applicants, including Christopher Iekel, a white male, who was ultimately selected.

Some three weeks after the first vacancy announcement,[1] Iekel was detailed from Hyattsville, Maryland to Crystal

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[1] The two positions announced in the November 1 and November 11 advertisements were identical but the second vacancy was never filled. It is the position advertised on November 1 that is in issue in this appeal.

City, Virginia to serve temporarily in the position of Supervisory Personnel Management Specialist--the job for which both he and Young applied. He was employed in that capacity until the end of March 1977.

John McCabe, Personnel Director of the Naval Sea Systems Command (NAVSEA), supervised the selection of the applicant who would receive the permanent promotion to the position. He was assisted by Nancy Panella and William Fordyce, who was later replaced by Rosina McWhirter. McCabe, Panella, and McWhirter are Navy personnel specialists and are all white.

Following the announcement of the two vacancies, Panella conducted interviews of a number of the applicants, including Iekel and Young. This action contravened Navy regulations which require that a selection panel be used to fill all supervisory positions. When Panella's

violation of the regulations became known, the interviews were terminated and a selection panel was convened by Fordyce to evaluate and rank the applicants for the vacancies.

The panel consisted of Raye J. Montague, who had served on approximately thirty selection panels, Arthur L. Fuller, who had also served on numerous panels during his twenty-two years with the Navy, and Louis H. Howard, who was qualified by his background to serve on such panels. Fuller was designated as chairman and as the Equal Employment Opportunity (EEO) representative. Montague and Fuller are black.

The panel, after consulting with McWhirter and Panella, established a procedure for evaluating and rating the applicants. It was determined that the panel would meet three times for rating

purposes: first, to review the individual applicant, and rate the candidates on that basis; next, to conduct interviews and rate the applicants again; and finally, to meet as a group to discuss their results and rate the candidates a third time. The panel used six criteria to rate each applicant with a weight assigned to each element: (1) understanding of systems method and administrative machinery (weighted 1); (2) ability to organize problems and apply sound judgment (weighted 1); (3) oral and written communications skills (weighted 1); (4); capacity to employ knowledge and abilities in resolving problems (weighted 1); (5) supervisory potential (weighted 2); and (6) substantive classification and staffing knowledge (weighted 1).

The panel, on January 24, 1977, completed the Merit Promotion Certificate which reflected their final recommendations. Young and another applicant were rated best qualified for the two vacancies, while Iekel and one other candidates were listed in a second group as being highly qualified. The panel delivered the Merit Promotion Certificate and rating sheets to McWhirter.

McWhirter scrutinized the recommendations and ratings of the panel and discovered the notation "My guess she's black" on a rating sheet which had been completed by panel chairman Fuller. This rating sheet dealt with an applicant other than Young or Iekel. McWhirter also felt that the panel members had incorrectly inflated their assessment of Young's experience, and had not properly evaluated supervisory performance appraisals.

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McWhirter thus concluded that the panel's work was improper, and she recommended that the Navy reject the recommendations and form a new panel.

The panel's rating and ranking sheets were also reviewed by Yvonne Jones, a black EEO official, who concluded that the comment made by Fuller constituted evidence of improper racial consideration sufficient to warrant a new selection panel. McWhirter and Jones reported their findings to McCabe who ultimately rejected the panel's recommendation and directed that a new panel be formed. The Command Deputy EEO Officer concurred in McCabe's decision.

A new panel was then formed, consisting of Mertina Monk, Harry Stoutmeyer and William DaRosa. This panel, using the same criteria as those employed by their predecessors, ranked Iekel highly quali-

fied, and recommended him for the available position on March 18, 1977. Young, on the other hand, was ranked sixth out of eight applicants. Iekel was appointed on March 25, 1977, after McWhirter and Jones reviewed the second panel's rating and ranking sheets and found no evidence of impropriety.

II.

The district court correctly considered the evidence developed during the trial of the case under the standards announced in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980). The initial burden was upon Young to prove by a preponderance of the evidence that she was not promoted to the position under conditions which, more likely than not, were based upon impermissible racial considerations. Burdine, 450 U.S. at

254; International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). After Young established her prima facie case, the Navy was required to articulate a legitimate non-discriminatory reason for its promotion choice. Young was then obligated to demonstrate that the Navy's reasons were pretextual. Burdine, 450 U.S. at 256; Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 458 (4th Cir. 1983).

We agree with the district court that Young established a prima facie case of discrimination. We disagree, however, with the court's conclusion that the proffered non-discriminatory reasons advanced by the Navy for choosing Iekel over Young and others were pretextual in that they were "unworthy of credence."

Young contends, and the trial court agreed, that there was evidence from which it could be concluded that the Navy preselected Iekel for the promotion and tailored the selection process to obtain the desired result. She argues that Iekel's detail to the position in question for longer than the regulations provide,[2] the improper applicant interview conducted by Panella, McWhirter's concern with personal conflicts between Young and Panella, and the extraordinary scrutiny given to the first panel's recommendations and ratings, amply support this conclusion.

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[2] Naval Naterial Command Instruction 12340.4A § 7a(4) (September 28, 1972) provided that details of more than sixty days to a higher grade position should be made by competitive procedures. As states previously, Iekel's detail, which was not made using competitive procedures, began on November 30, 1976 and terminated with his appointment in March, 1977.

The Navy counters by asserting that but for the rejection of the first panel's conclusions, Iekel's detail would have ended within the 60-day limit.[3] It characterizes Panella's interviews as a "mix-up," arguing that there was no evidence that they were conducted to assist or hinder any applicant. The Navy also argues that there is no evidence that race played any part in McWhirter's concern about the Young-Panella work relationship. With respect to the process employed in reviewing the work of the first panel, it contends that McWhirter's actions were in accordance with standard Navy personnel procedures. The Navy also

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[3] The first panel made their recommendation on January 24, 1977, fifty-five days after Iekel's detail.

points to EEO official Yvonne Jones' independent discovery of Fuller's notation.

We agree with the Navy that there is no clear-cut indication that race played a part in choosing the successful applicant. In Burdine, however, the Supreme Court indicated that the burden of establishing a prima facie case is not a heavy one. It may be satisfied by showing that a qualified applicant "was rejected under circumstances which give rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253. We feel that the evidence detailing the activities of the selection personnel is sufficient to establish a prima facie case of racial discrimination under this relatively easy test. However, the Navy articulated valid

non-discriminatory reasons for Iekel's selection which were not proven to be pretextual.

The Navy's first asserted non-discriminatory reason was that Iekel had been nominated by a properly chosen and impartial second panel. The trial court concluded that this explanation was unworthy of credence. We disagree. We perceive no sufficient reason to substitute our judgment for that of the Navy in concluding that there was an adequate basis to dissolve the first panel and convene a new one. The chairman wrote on an evaluation sheet that one of the candidates was apparently black. The Navy selection officials did not unilaterally disband the panel on this basis, but took action only after Mrs. Jones, the EEO official, insisted that the panel's process was tainted by this racial

comment. Likewise, there is no evidence of improper racial motivation in forming the second panel. Panel member Monk is black, Stoutmeyer is white, and DaRosa is Asian. While it is obvious that the first panel was at least technically tainted (a technicality that matured into a valid reason for disbanding the panel when the EEOC identified the racial notation as sufficient reason for disregarding the panel's work), it is clear that the second panel was correctly selected. In any event, the disbanding of the first panel and the selection of the second panel were, at most, mediate procedures that are insulated from a Title VII attack by our decision in Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981), cert. denied, 454 U.S. 892 (1982).

As its second non-discriminatory reason for selecting Iekel, the Navy asserts that he was better qualified than Young. Again, we agree that this was a properly articulated reason which was not shown by Young to be pretextual. Although Young worked for the Navy for twelve years, while Iekel was employed for only nine years, the record indicates that Iekel worked for a longer period in positions emphasizing classification and staffing--the criteria weighted most heavily by both panels. Iekel received two personal awards, a special achievement award for outstanding performance as an acting supervisor of a personnel group, and a letter of appreciation for personnel team leadership work. Iekel also consistently received above-average performance appraisals. On the other hand, Young, although awarded one performance commen-

dation, received only average performance ratings that included negative comments citing personal clashes, conflicts, and her poor attitude towards her supervisor. Young's leave record indicated nearly 30% absenteeism during 1976, the year for which she was last evaluated.

Implicit in the district court's opinion is a finding that Young is qualified for the promotion. The evidence sustains that opinion. The record, however, demonstrates that Iekel is more qualified than Young.[4] The rule in this

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[4] The district court apparently agreed with this assessment, stating at one point:

> I took careful notes here to day, and there is no question but what the book on Mrs. Young was that she wasn't the most qualified person in the world.
>
> ...
>
> I am going to have to consider that on their using this remark that Fuller put on his report as being a pretextual reason for hiring

circuit is that where relative qualifications are advanced as the non-discriminatory reason for an employment decision, the plaintiff has the burden of establishing that she was better qualified than the successful applicant. Anderson v. City of Bessmer City, 717 F.2d 149, 153 (4th Cir. 1983), cert. granted, 52 U.S.L.W. § 3906 (June 19, 1984); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir. 1983). Once the Navy's evidence showed that its reason for promoting Iekel was based on relative qualifications, Young had the burden of proving the reason pretextual, i.e., that she was better qualified. She failed to accomplish this task, and the district court erroneously concluded that the reason was "unworthy of credence."

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somebody [Mr. Iekel], who I believe is actually better qualified.

In view of the above, the judgment of the district court is reversed.

REVERSED

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 82-1089-A

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MARGARET YOUNG,

Plaintiff,

v.

JOHN LEHMAN, Secretary,
Department of the Navy,

Defendant.

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FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This action is brought by Margaret Young (plaintiff), a black female and a federal employee, against the Secretary of the Navy, because she was not selected for a position as Supervisory Personnel Management Specialist in 1977. She claims

that denial to this promotion violated her rights under §717 of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e-16.

1. Plaintiff is a black female citizen of the United States who resides in Capitol Heights, Maryland; she commenced her employment with the Department of Navy on May 17, 1971 as a GS-9, she was promoted to GS-11 in September of 1971 and to GS-12 in September of 1972; she is presently employed as a Personnel Staffing Specialist, GS-12, with Naval Material Command (NAVMAT).

2. In late 1976 and early 1977, the Naval Ship Engineering Center (NAVSEC), which had been located in Hyattsville, Maryland, merged with and moved to be co-located with NAVSEA in Arlington, Virginia.

3. On November 1, 1976 and November 11, 1976, NAVSEC issued vacancy announcements, each advertising a single position of Supervisory Personnel Management Specialist GS-201-13. The duty station of these two positions was to be Hyattsville, Maryland and then in Arlington, Virginia, after NAVSEC moved.

4. Plaintiff, who was then a Personnel Management Specialist GS-210-12, submitted an application for the Supervisory Personnel Management Specialist positions along with six other applicants.

5. John McCabe, Personnel Director of NAVSEA, was the selecting official for the two positions in question.

6. Nancy Panella was Acting Director of the NAVSEC Civilian 1 Division.

7. William Fordyce, a Personnel Specialist, was designated to assist Panella and McCabe in the selection process.

8. Rosina McWhirter, a Personnel Management Specialist, replaced William Fordyce as the assistant in the selection process.

9. Yvonne T. Jones, an EEO Specialist GS-13, was assigned to the NAVSEA headquarters EEO office.

10. In October 1976, Nancy B. Panella, the then Acting Director of the NAVSEC Civilian Personnel Division, sent Margaret Young to Crystal City, 20 miles away from any type of supervision, together with a trainee to be supervised and directed by Mrs. Young.

11. Christopher Iekel was detailed from Hyattsville, Maryland to Crystal City, Virginia in the position of Supervi-

sory Personnel Management Specialist from November 1, 1976 until the end of March, 1977. This detail was contrary to Navy Regulations, as Regulation 335 requires that a detail of more than 60 days to a position with known promotion potential be competitive to enable all eligible candidates to apply for the detailed position.

12. Following announcement of the two Supervisory Personnel Management Specialist positions and contrary to Navy Regulations, Nancy B. Panella conducted interviews of the job applicants. When this violation of regulations became known the interviews ceased. The applicable regulations required a selection panel to be used to fill all supervisory positions regardless of grade.

13. After Ms. Panella's interviews were terminated, a selection panel was established by William Fordyce to evaluate and rank applicants for the position in question.

14. The panel consisted of Raye J. Montague (Raye Parratt at the time), Arthur L. Fuller and Louis H. Howard. Mrs. Montague had served on approximately thirty selection panels for numerous positions. Mr. Fuller during his twenty-two years of service with the Navy had served on numerous selection panels and Mr. Howard by background was qualified to be on the panel. Mr. Fuller served as chairman of the panel and was designated to be the EEO representative.

15. Preliminarily, the panel established a plan for evaluating and rating all applicants. Each panel member was given the position description for the

vacancy, the standard Form 171 for each applicant and the vacancy announcement. Each panel member completed an initial rating sheet based on the Form 171 and a form based upon the results of a discussion among the panel members.

16. The procedures followed by the panel were not adopted until after discussions among the panelists and with Ms. Panella and had received her approval.

17. After the panel was formed, one member, Raye Montague, learned from the standard Form 171 application that her name had been added as a reference to plaintiff's application. Mrs. Montague had known Mrs. Young in the former's capacity of Federal Women's Program Coordinater. This matter was called to the attention of the panel chairman, and he in turn contacted Rosina McWhirter, who informed Ms. Panella. Thereafter, Ms.

Panella contacted Mrs. Montague, and instructed her to serve on the panel anyway and indicated that the reference designation did not matter. The panel evaluated the seven job applicants pursuant to the system developed by Nancy Panella and the panel members. On January 24, 1977 the panel completed the Merit Promotion Certificate which reflected the final conclusions of the panel. Plaintiff and a second job applicant were listed by the panel as the best qualified applicants for the two Supervisory Personnel Management Specialist positions. Christophe Iekel and one other applicant were listed in a second grouping as being highly qualified for the two positions.

18. The panels Merit Promotion Certificate listing the qualified applicants and their rating sheets were delivered to Rosina McWhirter on January

24, 1977. I find that Rosina McWhirter and Nancy Panella were disappointed in the panels recommendation because there had been a predetermination to give the position in question to Christopher Iekel, a white male.

19. Supportive of this predetermination are the following facts: (1) the unauthorized interviews by Ms. Panella after the vacancies were announced; (2) the detailing of Iekel to one of the positions for a period in excess of that permitted by Navy Regulations; (3) the extraordinary scrutiny given to the first panels recommendations and ratings; (4) exchanges between McWhirter and Panella concerning what would happen if the plaintiff was selected for the position.

20. A series of events transpired after the original panel's Merit Promotion Certificate listing the qualified candi-

date that resulted in a decision to disregard the panel's recommendations and to create a new panel.

21. Notwithstanding the first panel's findings, a procedure existed whereby John McCabe, the selecting official, could have disregarded the panel's recommendation and appointed someone else from the applicant list. This required a letter explaining why the panel's recommendations were not being followed. The failure to write such a letter was due in part to a fear that the present plaintiff would bring a lawsuit, but in effect it was a poorly disguised effort to cover the selecting official's desires to have Mr. Iekel appointed to the position in question.

22. After a new panel was constituted, it established new procedures for reviewing applicants and ultimately made a determination that Mr. Iekel was the best

qualified person for the position and the plaintiff was ranked number six out of eight applicants.

23. In time, the second panel's recommendations were followed and Iekel was appointed to the disputed position.

24. Since the second panel ranked Iekel as the best qualified, their work sheets were never given the scrutiny that the first panel's findings were subjected to. Christopher Iekel was selected to the position in question on March 25, 1977, and thereafter, the plaintiff commenced an EEO complaint. This did not rectify her grievances, and on June 1, 1982, she received official notice that her complaint of discrimination was rejected and was given authority to commence the present action.

25. The second position, for a Supervisory Personnel Management Specialist GS-13, referred to in earlier findings, has never been filled.

26. Plaintiff has not been promoted to a higher grade level

CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant to 42 U.S.C. §2000e-16, Title VII, of the Civil Rights Act of 1964 as amended. This act provides the exclusive remedy for federal employees' claims of discrimination based on race. Brown v. GSA, 425 U.S. 820 (1976).

2. Plaintiff established a prima facie case by showing that the selecting officials, on a predetermined basis, had decided to hire a white male for the position in question. This created a

rebuttable presumption that the employer discriminated against her. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corporation v. Green, 441 U.S. 792 (1973).

3 After the court denied defendant's motion to dismiss at the conclusion of the plaintiff's evidence, the case took on a new dimension. As the court then, from all the evidence, had to determine whether plaintiff's rejection was discriminatory within the meaning of Title VII. United States Postal Service Board of Govenors v. Aikens, No. 81-1044 (decided April 4, 1983).

4. Plaintiff has carried her burden of persuasion by convincing the court that defendant's proffered explanation for the action taken is unworthy of credence (Burdine and Aikens)

5. That as the prevailing party the plaintiff is entitled to the following relief

(1) Retroactive promotion to GS-13, effective February 15, 1977 (court allows 19 days for selecting official to act on first panel's findings).

(2) Back pay from February 15, 1977 to the time plaintiff is promoted to GS-13.

(3) Attorneys fees and costs. 42 U.S.C. §2000e-5

An order is this day being entered granting the above relief and setting a schedule for disposition of the fee and cost issues.

DATE: s/s May 20, 1983

UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
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CLERK

No. 84-1239

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET YOUNG, PETITIONER

v.

JOHN LEHMAN, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Anderson v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985) 4, 6, 7

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 ..... 5, 7

Pullman Standard Co. v. *Swint*, 456 U.S. 273 4

Taylor v. *Jones*, 653 F.2d 1193 5

Teamsters v. *United States*, 431 U.S. 324 7

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 ..... 5, 7

United States v. *United States Gypsum Co.*, 333 U.S. 364 4

Wainwright v. *Witt*, No. 83-1427 (Jan. 21, 1985) 5, 6

Statute and rules:

Civil Rights Act of 1964, Tit. VII, § 717, 42 U.S.C. 2000e-16 1

Fed. R. Civ. P. :

Rule 52 4

Rule 52(a) 6

In the Supreme Court of the United States

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JOHN LEHMAN, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the court of appeals' holding that she was not discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, § 717, 42 U.S.C. 2000e-16.

1. Petitioner, a black female, applied for the position of Supervisory Personnel Management Specialist with the Navy Ship Engineering Center (NAVSEC). Six other individuals, including Christopher Iekel, a white male, also applied for this advertised vacancy; Iekel was detailed to the position on a temporary basis. Pet. App. 3a.

The selection panel convened to fill the vacancy, reviewed the applications, interviewed the applicants, and rated them according to specific job-related criteria. The panel gave petitioner and another applicant a "best qualified" rating, while Iekel and one other applicant were listed as "highly qualified." The panel then delivered the recommendations

favoring petitioner and the rating sheets of the panel members to a Navy personnel specialist who was involved in supervising the selection process. Pet. App. 4a-7a.

Upon reviewing the recommendations and rating sheets returned by the panel, the personnel specialist discovered the notation "My guess she's black" on a rating sheet dealing with an applicant other than petitioner or Iekel, which had been completed by the panel chairman (himself a black). On the basis of this notation and her view that the panel had not accorded proper weight to the relevant criteria, the personnel specialist recommended that the panel's recommendations be rejected, and that a second panel be convened. The rating sheets were also reviewed by an EEO official, who concluded that the chairman's notation constituted evidence of improper racial consideration sufficient to warrant the formation of a new panel. The personnel specialist and the EEO official reported their findings to the Personnel Director, who rejected the panel's recommendation and ordered the creation of a new panel; the Command Deputy EEO Officer concurred in this decision. Pet. App. 7a-8a.

The second panel used the same criteria as its predecessor. It ranked Iekel "highly qualified" and recommended him for the position. Petitioner was ranked sixth out of eight applicants. Iekel was given the appointment after the personnel specialist and the EEO official went over the second panel's rating sheets and discovered no evidence of impropriety. Pet. App. 8a-9a.

Petitioner thereafter filed an EEO complaint. Pet. App. 30a. After unsuccessfully exhausting her administrative remedies, she commenced this Title VII action in the district court, alleging that she had been discriminated against on the basis of her race. After a trial, the district court determined that petitioner had established a prima facie case of

discrimination, and that the Navy's proffered nondiscriminatory reasons for petitioner's nonselection—*i.e.*, the racial taint associated with the first panel's decision and Iekel's superior qualifications—were "unworthy of credence." Pet. App. 30a-32a. The court so held even though it had stated, in the course of the trial, that "there is no question but what the book on [petitioner] was that she wasn't the most qualified person in the world," and that "I believe [Iekel] is actually better qualified." Pet. App. 17a-18a n.4. The court did not even mention the racial notation in its findings or conclusions.

The government appealed, and the Fourth Circuit reversed. The court of appeals held that petitioner had established a prima facie case, but that she had failed to carry her burden of demonstrating the Navy's proffered reasons for her nonselection to be pretextual. Pet. App. 10a. The court stated that the racial notation "was an adequate basis to dissolve the first panel and convene a new one," especially since the Navy personnel officials only took this step "after Mrs. Jones, the EEO official, insisted that the panel's process was tainted by this racial comment." *Id.* at 14a-15a. The court further declared that the Navy's contention that Iekel was better qualified than petitioner "was a properly articulated reason which was not shown by [petitioner] to be pretextual." *Id.* at 16a. The court noted that "the record indicates that Iekel worked for a longer period in positions emphasizing classification and staffing—the criteria weighted most heavily by both panels," and that Iekel—unlike petitioner—had received several awards and commendations, as well as consistently above average performance appraisals. *Id.* at 16a-17a. Accordingly, the court of appeals held that petitioner had failed to rebut the Navy's showing of legitimate nondiscriminatory reasons for her nonselection.

2. The decision of the court of appeals is correct and does not conflict with any decisions of this Court or any other court of appeals. Thus, further review by this Court is not warranted.

Petitioner contends that the court of appeals engaged in "appellate factfinding" (Pet. 7, 9), contrary to Rule 52, Fed. R. Civ. P., and this Court's decision in *Pullman Standard Co.* v. *Swint,* 456 U.S. 273 (1982). See also *Anderson* v. *City of Bessemer City,* No. 83-1623 (Mar. 19, 1985). The court of appeals, however, plainly determined that the district court's decision was "clearly erroneous," albeit without using that specific phrase.[1]

In *Pullman,* this Court held that the district court's determination with respect to the "ultimate fact" of intentional discrimination is subject to review under the "clearly erroneous" standard of Rule 52. 456 U.S. at 286-288. The Court further stated that "[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 456 U.S. at 284-285 n.14, citing *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). Accord, *Anderson,* slip op. 7-8. Examination of the court of appeals' opinion leads inescapably to the conclusion that the court was left with just such a "definite and firm conviction."

The Fourth Circuit's conviction of error derived chiefly from two sources: (1) the racial notation calling into question the first panel's selection process, which the district court had completely ignored in its recitation of the facts,

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[1]Nothing in *Anderson* v. *City of Bessemer City, supra,* this Court's most recent pronouncement on this subject, suggests that an appellate court may correct a trial court's manifest error in finding facts only if it invokes talismanically that specific phrase.

even though that notation had prompted an EEO official to insist on the formation of a new panel; and (2) the fact that the district court itself stated that Iekel's qualifications were superior to those of petitioner. Under these circumstances, the court of appeals properly determined that petitioner had not carried her burden of demonstrating that the Navy's proffered reasons for not promoting her were pretextual. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). Thus there is no occasion here to review this case in order to recall an errant court of appeals to a proper conception of its responsibilities, and this particular fact-bound determination clearly does not of itself warrant review by this Court.[2]

Petitioner's reliance on this Court's recent decision in *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), is misplaced. Contrary to petitioner's assertion, this case—unlike *Witt*—does not "turn[ ] largely on the demeanor and credibility" of witnesses (Pet. 9). Rather, the court of appeals found the district court's error to consist of its decision to ignore objectively demonstrable record evidence, *i.e.*, the racial comment and Iekel's superior credentials; indeed, the clearly erroneous character of the district court's decision is demonstrated by the fact that the court itself recognized that Iekel's qualifications were superior to those of petitioner (Pet. App. 17a-18a n.4), but nonetheless held that

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[2]Moreover, it is apparent that the officials involved in this case could not blind themselves to evidence of racial consideration by an employment panel and still remain faithful to Title VII's policy of "fair and racially neutral employment and personnel decisions." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973). The district court thus clearly erred in disregarding the Navy's obligation not to permit racial considerations to taint the panel's decisionmaking process, particularly since "[e]mployer toleration of a discriminatory atmosphere alone gives rise to a cause of action by the plaintiff." *Taylor* v. *Jones*, 653 F.2d 1193, 1199 (1981).

petitioner had satisfied her burden of proving pretext.[3] These flaws manifestly do not turn upon witness demeanor and credibility. Thus, *Witt* is completely inapposite.

Nor is this a case, like *Anderson* v. *City of Bessemer City, supra,* in which the record would plausibly support either the conclusion of the district court or the court of appeals (see *Anderson,* slip op. 11-12). Instead, as the court of appeals pointed out, there is here "no evidence of improper racial motivation in forming the second panel. * * * In any event, the disbanding of the first panel and the selection of the second panel were, at most, mediate procedures * * * insulated from a Title VII attack" (Pet. App. 15a).

In sum, petitioner's arguments could find support in *Anderson* only if one disregarded Justice Powell's warning in his concurrence in that case (slip op. 1):

> I am concerned that one may read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.

Petitioner in effect urges here precisely such a conclusory application of Rule 52(a).

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[3]This recognition of Iekel's superior qualifications also sharply distinguishes this case from *Anderson* v. *City of Bessemer City, supra,* in which this Court criticized the court of appeals for substituting its judgment for that of the district court concerning the ranking of the candidates (slip op. 10-12). Indeed, in addition to the district court's comments reported at Pet. App. 17a-18a n.4, there is the conspicuous absence from the district court's findings of any comparison of the qualifications of petitioner and Iekel (Pet. App. 20a-33a). Cf. *Anderson,* slip op. 3.

Finally, petitioner contends (Pet. 12-14) that this case presents the issue of whether a Title VII plaintiff must prove that he or she is better qualified than the successful applicant; petitioner argues that such a requirement "would effectively repeal Title VII for the substantial number of positions in the United States labor market for which all of the qualified applicants are essentially equally qualified" (Pet. App. 14). Whatever the merit of petitioner's position, this case does not present that issue. Here, both the court of appeals and the district court recognized that petitioner was not as well qualified as the successful applicant.[4] This case therefore does not involve the latitude of the employer to choose among "essentially equally qualified" applicants, and the question raised by petitioner is not before this Court.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1985

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[4]It is clear from this Court's decisions that an applicant must demonstrate at a minimum that he was not rejected because of a "relative lack of qualifications." *Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977); see also *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 259; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802.

[5]Nor, contrary to petitioner's suggestion, was that issue properly presented in *Anderson*, where the district court held that Anderson had superior qualifications, and the court of appeals believed that the candidate selected was better qualified (see slip op. 10-12). Accordingly, it is not surprising that this Court did not address in *Anderson* the situation in which two candidates are equally qualified.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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JOHN LEHMAN

ON PETITION FOR WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner urges that the decision of the Fourth Circuit be vacated, and the case vacated for further proceedings in light of Anderson v. City of Bessemer City., No. 83-1623 (March 19, 1985).

Less than a month ago this Court held that the Fourth Circuit "Court of Appeals misapprehended and misapplied the clearly erroneous rule." Anderson v. City of Bessemer City (Slip opinion, p. 1). This case was decided by the same Court of Appeals whose misunderstanding of Rule 52 was delineated and reversed by this Court in Anderson. When the instant case was decided by the Fourth Circuit in January, 1985, the misapprehension of Rule 52 embodied in the court of appeals' opinion in Anderson stood uncorrected, and was the controlling law of that circuit. Respondent suggests that the court of appeals, even had it been aware that the Fourth Circuit decision in Anderson had misconstrued Rule 52, would have decided this case the same way. There is, we urge, no reason to engage in such speculation regarding how this case would have been

decided had the Fourth Circuit had the advantage of this Court's decision in Anderson. The decision below should be vacated and remanded to the court of appeals with instructions to consider the matter further in light of Anderson. Petitioner's right to have this case reconsidered under the correct legal standard cannot be denied merely because respondent predicts that it would prevail on remand.

The trial court in this case, having had an opportunity to hear the testimony and observe the demeanor of the defense witnesses, concluded that their explanation of why petitioner was not promoted was "unworthy of credance". (Pet. App. 32a) and that their testimony was "a poorly disguised effort" to cover their

actual motivation. (Pet. App. 29a). Anderson concluded that such findings regarding credibility are entitled to

> even greater deference . . . . For only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's . . . belief in what is said. (Slip opinion, p. 10).

The court of appeals in the instant case, writing prior to Anderson, gave no deference whatever to the district judge's assessment that the defense witnesses were not telling the truth. Respondent suggests that other evidence in this case might overcome even the ordinarily conclusive trial court credibility assessments; but whether the court of appeals would have agreed with that contention we cannot know, since the Fourth Circuit, understandably unaware of the then forthcoming

decision in Anderson, did not of course purport to apply the "greater deference" standard there announced.

Respondent suggests that the trial judge erred because he "ignored" certain defense evidence. (Mem. Resp. 3, 4, 5). The Fourth Circuit, however, did not remand this case to the trial judge for reconsideration in light of any "ignored"" evidence. Rather than affording the district court an opportunity to reconsider any such evidence, the appellate court simply made its own de novo evaluation of the record. That was precisely the practice condemned by this Court in Pullman-Standard v. Swint, 456 U.S. 273 (1982). In Swint the Fifth Circuit, having concluded that the lower ocurt had failed to consider certain evidence bearing on the bona fides of a seniority system, 456 U.S. at 282, proceeded to make

its own findings of fact. This Court reversed, holding that in such a situation "the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." 456 U.S. at 291. That rule should be applied here as well.

Respondent insists that even under the standards announced in Anderson the district court committed clear error. We do not ask this Court to resolve that question, or to reject on the merits the respondent's contentions. We ask only that this Court remand this case to the Fourth Circuit and thus afford to both petitioner and respondent an opportunity to present their arguments regarding the applicability of Anderson to the particular circumstances of this case.

CONCLUSION

For the above reasons, the Court should grant the petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of Anderson v. City of Bessemer City.

Respectfully submitted,

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